IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 362 of 2004
In
COMPANY PETITION No. 7 of 2001
With
COMPANY APPLICATION No. 232 of 2005
In
COMPANY PETITION No. 7 of 2001
With
COMPANY APPLICATION No. 375 of 2004
In
COMPANY PETITION No. 7 of 2001
With
COMPANY APPLICATION No. 167 of 2005
In
COMPANY PETITION No. 127 of 1995
With
COMPANY APPLICATION No. 219 of 1999
With
COMPANY APPLICATION No. 233 of 2005
In
COMPANY PETITION No. 7 of 2001
With
COMPANY APPLICATION No. 225 of 2002
With
COMPANY APPLICATION No. 362 of 1998
With
COMPANY APPLICATION No. 356 of 1998
With
COMPANY APPLICATION No. 316 of 1999
With
COMPANY APPLICATION No. 174 of 2005
In
COMPANY PETITION No. 7 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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GUJARAT STEEL TUBE EMPLOYEES UNION & 1 - Applicant
Versus
O.L.OF GUJARAT STEEL TUBES LTD & 5 - Respondents

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Appearance :

1. Company Application Nos. 362/2004 & 232/2005

MR MUKUL SINHA for Applicant.
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2, 5,
MS NALINI S LODHA for Respondent(s) : 3, 6,
MR UDAY R BHATT for Respondent(s) : 4.

2. Company Application Nos. 375/2004 & 233/2005

MR LN MEDIPALLY for Applicant.
OFFICIAL LIQUIDATOR for respondent No. 1.

Ms. Nalini Lodha for respondent No. 3.
Mr. Uday R. Bhatt for respondent No. 4.

3. Company Application No. 167 of 2005

Dr. MUKUL SINHA for Applicants.
OFFICLAL LIQUIDATOR for respondent No. 1.

4. Company Application Nos. 356 & 362 of 1998

MR DS VASAVADA for Applicants.
OFFICIAL LIQUIDATOR for respondent No. 1.
MR RM DESAI for respondent No. 2.
MR HM BHAGAT for respondent No. 3.
MR AC GANDHI for respondent No. 4.

5. Company Application No. 316 of 1999

MR RM DESAI for Applicant.
OFFICIAL LIQUIDATOR for respondent No. 1.

6. Company Application No. 219 of 1999

MR DS VASAVADA for Applicant.
OFFICIAL LIQUIDATOR for respondent No. 1.
MR RM DESAI for respondent No. 2-4.
MR AC GANDHI for respondent No. 3.

7. Company Application No. 225 of 2002

MR AC GANDHI for Applicant.
OFFICIAL LIQUIDATOR for respondent No. 1.

8. Company Application No. 174 of 2005

MR KM PAUL for Applicant.
OFFICIAL LIQUIDATOR for respondent No. 1.
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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 09/01/2006

COMMON ORAL JUDGMENT

1.Since common issue is raised by the learned advocates appearing for the workmen with regard to their exclusive right under Section 529-A of the Companies Act, 1956 of satisfaction of their dues prior to the right of any other Creditors either Secured or Unsecured, all these applications are heard together and the said issue is decided by this common judgment and order.

2.Company Application Nos. 362 of 2004 and 232 of 2005 are filed by Gujarat Steel Tubes Employees Union and Gujarat Mazdoor Sabha, Ahmedabad. In Company Application No. 362 of 2004, the applicants have sought for the direction to the Official Liquidator of Gujarat Steel Tubes Limited (In Liquidation) to disburse an amount of Rs. 12 Crores realized from the sale of plant and machinery amongst the employees as a

part payment towards their legal dues, claim for which is pending with the Official Liquidator.

3. In Company Application No. 232 of 2005, a declaration was sought for from this Court to the effect that the members of the applicant – Union are entitled to the entire amount of Rs. 58,37,77,872/- as admissible claims and have priority above all other creditors including secured creditors. The applicants have also sought for the direction to the Official Liquidator to disburse an amount of Rs. 58,37,77,872/- amongst the workers, claim for which is pending with the Official Liquidator, from the amount realized from the sale of plant and machinery and building and land. The applicants have also sought for the direction to the secured creditors / banks to return the amount which they have received under order dated 04.11.2004 passed by this Court with

interest.

4.Company Application No. 375 of 2004 is filed by Gujarat Steel Tube Kamdar Suraksha Samiti seeking direction from this Court to the Official Liquidator of Gujarat Steel Tubes Limited (In Liquidation) to make available the amount of Rs. 75,000/- to each workman of the applicant union towards their legal dues out of the amount of Rs. 12.31 crores and interest thereon till date accrued from the sale of plant and machinery.

5.Company Application No. 233 of 2005 is filed by Gujarat Steel Tube Kamdar Suraksha Samiti seeking direction from this Court to the Official Liquidator to make available the amount of Rs. 1,50,000/- to each workmen of the applicant union towards their legal dues out of the amount of Rs. 29 crores and odd and interest thereon till date accrued from the

sale of plant and machinery.

6. Company Application No. 167 of 2005 is filed by Gujarat Mazdoor Sabha seeking direction to the Official Liquidator of M/s. Neeka Tubes Limited to disburse an amount of Rs. 4.50 Crores realized from the sale of plant and machinery and land and building amongst the employees as a part payment towards their legal dues, claim for which is pending with the Official Liquidator.

7. Company Application No. 219 of 1999 is filed by Textile Labour Association and Company Application No. 225 of 2002 is filed by Industrial Investment Bank of India Limited seeking direction inter alia to the Official Liquidator of Omex Investors Limited to disburse an amount amongst the secured creditors as well as workers, realized on sale of assets of the Company in liquidation.

8.Company Application Nos. 362 of 1998 and 356 of 1998 are filed by Textile Labour Association and Company Application No. 316 of 1999 is filed by Industrial Development Bank of India praying for the direction from this Court to the Official Liquidator to disburse an amount amongst the secured creditors and the workers, realized on sale of the assets of the Company in liquidation.

9.Company Application No. 174 of 2005 is filed by one Mr. C.H. Patel, Ahmedabad praying for the direction to the Official Liquidator to disburse an amount of Rs. 6,24,330/- in favour of the applicant towards legal dues on account of outstanding salary, bonus, gratuity, retrenchment compensation, leave encashment etc. as determined by the Labour Court.

10.Though this Court is not disposing of all

these applications by this common judgment and order, they are tagged together only because the learned advocates appearing in all these matters on behalf of their respective parties have made their submissions on the common issue which is referred to above and after deciding the said issue, the office is directed to place these matters for further orders before the appropriate Court.

11.In Company Application No. 362 of 2004, it is the case of the applicant – union that the Company, namely, Gujarat Steel Tubes Limited was ordered to be wound up by this Court by an order dated 27.12.2001 passed in Company Petition No. 7 of 2001 and the Official Liquidator attached to this Court has been appointed as the Liquidator with all the powers under the provisions of the Companies Act, 1956. This Court vide its order dated 05.02.2003 has constituted Sale Committee

consisting of Official Liquidator as its Chairman and representatives of secured creditors and workers union as its members for disposing of the assets of the Company as per the provisions of Section 457 of the Companies Act, 1956 read with Rule 272 and 273 of Companies (Court) Rules, 1959 by issuing advertisement in newspaper and conducting public auction. This Court vide its order dated 27.11.2003 passed in O.L.R. No. 87 of 2003 confirmed the sale of all assets and properties except land for Rs. 12.31 Crores and the said amount has already been received by the Official Liquidator. Thereafter, on the basis of the report submitted by the Official Liquidator, auction for land was taken place before this Court and vide order dated 30.09.2004, this Court has confirmed the sale at the consideration of Rs. 42.10 Crores and this Court has issued certain directions for effecting the sale and receipt of

consideration.

12.It is also the case of the applicant – Union that they have already lodged the claim of the workers for their dues receivable from the Company in liquidation with regard to unpaid wages, bonus, leave encashment, retrenchment compensation, gratuity, P.F. etc. with the Official Liquidator in respect of 1118 workmen employed in the factory and 229 workmen employed as office staff and as per the directions of this Court, the Official Liquidator has already completed the process of assessing the claims. The total claim of the workmen for the period from June 1997 to 27.12.2001 was Rs. 46,13,54,855/- and the total claim of the office staff for the period from June 1997 to 27.12.2001 is Rs. 10,71,37,951/-. The total claim of the workmen is, therefore, Rs. 56,84,92,806/-. The Chartered Accountant appointed by the Official Liquidator has

accepted and certified the claim of Rs. 26,09,50,142/- for workmen and Rs. 6,17,40,772/- for office staff, total claim being Rs. 32,26,19,914/-. The applicant – Union has not accepted this amount and has filed its objections. It is in this background of the matter, the applicant – Union has preferred this application praying for the direction for disbursement of the amount towards part of the claim lodged and admitted.

13.It is also the case of the applicant that as per the provisions of the Companies Act, 1956, Section 529 & Section 529-A in particular and in view of the law laid down by this Court and the Hon'ble Apex Court, members of the applicant union have first right over the amount realized by way of sell of the property of the Company in liquidation and that rights of the other creditors can be settled only after the claims of workmen are settled. It is

also the case of the applicant union that the workmen have not received any payment for the last seven years and are facing acute financial crisis.

14.In Company Application No. 375 of 2004, it is the case of the applicant union that the applicant union has been registered on 27.07.2000 and has a large chunk of members consisting of 1010 out of total 1200 permanent workmen employed in Gujarat Steel Tubes Limited (In liquidation). It is also the case of the applicant union that each workmen member be made available the amount to the extent of Rs.75,000/- out of the amount realized on sale of plant and machinery in question. It is also contended in the said application that Section 529-A of the Companies Act, 1956 mandates preference to be given to the legal dues of the workmen.

15.Considering both these applications, this Court has passed an order on 04.11.2004 observing that after having heard the parties and taking into consideration the fact that State Bank of India viz. Respondent No. 3 in Company Application No. 362 of 2004 has not lodged its claim with the Official Liquidator and the further fact that ratio regarding entitlement of the workmen qua the secured creditors has not been worked out, has held that it would be in the fitness of things if a direction is made to the Official Liquidator to distribute a sum of Rs. 4 Crores in the ratio of 60% to the workmen and 40% to the secured creditors i.e. the first charge holders. The Court has, therefore, directed the Official Liquidator to make payment to the workmen by Account Payee Cheque upon identification by the representative of the applicant union. In so far as the payment relatable to the secured creditors is concerned, the Official Liquidator

was directed to make payment to Bank of Baroda who in turn shall distribute amongst the other secured creditors. For the purpose of such disbursement, it was open to the Official Liquidator to prematurely encash fixed deposit receipts. The Court has also made it clear that this arrangement was purely by way of adhoc distribution without prejudice to rights and contentions of the parties and they were directed to return the payment, as and when, called upon by the Court, with interest at the prevailing rate of fixed deposit receipts, if ultimately it is found that the recipient is either not entitled to any sum or is entitled to a lesser amount than paid to it under the said order.

16. During the pendency of the aforesaid two applications and after the aforesaid order is passed by this Court, the respective unions have filed two more applications before this

Court, namely, Company Application Nos. 232 & 233 of 2005. In both these applications, the claims originally made were enhanced in view of the fact that by this time, the land of the Company in liquidation was also sold and an amount of Rs. 42.10 Crores was realized on sale of the land of the Company in liquidation. The applicants union more or less have reiterated all their contentions in these two applications. However, considering the O.L. Report dated 25.03.2005 placed before this Court, the applicants have submitted that their objections have not been taken into consideration and virtually, the report of the Chartered Accountant was taken into consideration. The applicants have, therefore, prayed before this Court to examine their claim and work out the final ratio.

17.Dr. Mukul Sinha, learned advocate appearing for the applicant union in Company Application

Nos. 362 of 2004 & 232 of 2005 has taken the lead in making his submissions. He has submitted that the applicants union have the first charge over the amount realized by way of sale of the property of the Company in liquidation and the rights of the other creditors including the secured creditors can be settled only after the claims of workmen are settled. In support of this submission, he has invited the Court's attention to the decision of the Hon'ble Supreme Court in the case of *Andhra Bank V/s. Official Liquidator and another, 2005 AIR SCW 1608* wherein doubt was raised about the correctness of the statement of law contained in para 76 of the judgment of the Hon'ble Supreme Court in the case of *Allahabad Bank V/s. Canara Bank and another (2000) 4 SCC 406* and the matter was placed before the Bench of three Judges of the Hon'ble Supreme Court. The Hon'ble Supreme Court after considering the provisions contained in

Section 529, 529-A has observed that the secured creditors have two options (i) they may desire to go before the Company Judge; or (ii) they may stand outside the winding up proceedings. The secured creditors of the second category, however, would come within the purview of Section 529-A(1)(b) read with proviso (c) appended to Section 529(1). The 'workmen's portion' as contained in proviso (c) of sub-section (3) of Section 529 in relation to the security of any secured creditor means the amount which bears to the value of the security in the same proportion as the amount of the workmen's dues bears to the aggregate of (a) workmen's due, and (b) the amount of the debts due to all the creditors. The Court held that the illustration appended to clause (c) of sub-section (3) of Section 529 is a clear pointer to the effect that the amount of debts due to the secured creditors should be taken into consideration for the purpose of

ascertaining the workmen's portion of security. The Court further observed that the language of Section 529-A is also clear and unequivocal, in terms whereof the workmen's due or the debts due to the secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with such dues shall have priority over all other debts. Once the workmen's portion is worked out in terms of proviso (c) of sub-section (1) of Section 529, indisputably the claim of the workmen as also the secured creditors will have to be paid in terms of Section 529-A. The Court has also made it very clear that the words “so much of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso” obviously mean the amount taken away from the private realization of the secured creditor by the liquidator by way of enforcing the charge for workmen's dues under clause (c)

of the proviso to Section 529(1) “rateably” against each secured creditor. To that extent, the secured creditor who has stood outside the winding up and who has lost a part of the monies otherwise covered by security, can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all creditors, by virtue of Section 529-A(1)(b). The Court emphasized that whatever secured creditor loses towards the workmen's portion out of the security, he can claim the same amount with priority over such unsecured creditors out of realization made by other creditors whose moneys are lying in the Tribunal. After clarifying the aforesaid situation, the Court has observed that while determining the point No. 6, however, a stray observation was made to the effect that the “workmen's dues” have priority over all other creditors, secured and unsecured because of Section 529-A(1)(a). Such a question

did not arise in the case as the Allahabad Bank was indisputably an unsecured creditor. The Court, therefore, took the view that such an observation was neither required to be made keeping in view the fact situation obtaining therein nor does it find support from the clear and unambiguous language contained in Section 529-A(1)(a). The Court, therefore, has no hesitation in holding that finding of the Hon'ble Supreme Court in the case of Allahabad Bank to the aforementioned extent does not lay down the correct law. The Court further observed that the reliance was wrongly placed on National Textile Workers' Union and Others V/s. P.R. Ramakrishnan and Others [1983] 1 SCC 228 as the question which arose therein was only as regard the right of the workers to be heard in the winding up proceeding. The said decision was, therefore, not applicable.

18.Based on the aforesaid judgment of the Hon'ble

Supreme Court, Dr. Sinha has strongly urged before the Court that the secured creditors have come before this Court meaning thereby they have not exercised their option to remain outside the winding up and they have relinquished their security. He has, therefore, submitted that as per the provisions contained in Section 529-A which starts with non-obstante clause and says that in the winding up of a Company, workmen's dues and debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 *pari passu* with such dues shall be paid in priority to all other debts. He has submitted that under clause (c) of the proviso to sub-section (1) of Section 529, estimate of the debt due to such secured creditor as could not be realized by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less,

shall rank *pari passu* with the workmen's dues for the purpose of Section 529-A. Since the secured creditors have not sacrificed anything under the proviso (c) to Sub-section (1) of Section 529, they have no right to claim any priority under Section 529-A. He has, therefore, submitted that the workmen shall have the exclusive right of satisfaction of their dues in priority to all other creditors including secured creditors. He has, therefore, submitted that the entire amount should be distributed amongst the workers excluding the claim of the secured creditors and this Court should direct the secured creditors to return the amount which was earlier disbursed in their favour by virtue of an order passed by this Court on 04.11.2004.

19.Learned advocates Mr. L.N. Medipally and Mr. D.S. Vasavada appearing for their respective unions have adopted the arguments of Dr. Sinha

that their respective unions should be held to have priority of the claims of their members for the purpose of satisfaction of their dues and they should be paid first before any disbursement is made in favour of the secured creditors.

20.The claim of the workers was strongly objected to by the learned advocates appearing on behalf of the secured creditors. In this connection, Learned advocates Mr. R.M. Desai, Mr. A.C. Gandhi, Mrs. Nalini Lodha, Mr. Uday Bhatt, Mr. Sandeep M. Singhi and learned Senior advocate Mr. Mihir J. Thakore have made their submissions.

21.The learned advocates appearing for the Secured Creditors have submitted that the workman has no right to realize the security. The secured creditors have right to realize the amount under Section 529 of the Companies Act,

1956. The stage envisaged under Section 529-A has still not come. The secured creditors remained outside the winding up proceedings. Simply because they participate in the proceedings for the sake of convenience, it does not amount to relinquishment of their securities. Reliance was placed on the decision of the Bombay High Court in the case of *Cafin Homes Ltd. V/s. Lloyds Steel Industries Ltd., 106 Company Cases 52*. The issue before the Court was whether the winding up petition filed by the secured creditor is maintainable. The Court has observed that the secured creditor who seeks to prove the whole of his debt in the course of the proceedings of winding up must, before he can prove his debt, relinquish his security for the benefit of the general body of the creditors. If he surrenders his security for the benefit of the general body of creditors, he may prove the whole of his debt. If the secured creditor has

realized his security, he may prove for the balance due to him after deducting the net amount that has been realized. The stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If he elects to prove in the course of winding up the whole of the debt due and owing to him he has to necessarily surrender his security for the benefit of the general body of creditors. That however, cannot be construed to mean that when he files a petition for winding up, a secured creditor must relinquish his security. Therefore, it would be wholly inappropriate and inapposite to require the secured creditor at the stage when he files a company petition for winding up to exercise the option of relinquishing his security since that stage does not arise until the debt is to be proved. The Court accordingly held that there could be no doubt about the proposition that the object

of a petition for winding up is to realize the property of the company for distribution to all the creditors in accordance with the applicable rules and the petitioner had evinced a clear intention to enforce the security by filing a suit in the court for the recovery of its dues and the enforcement of its securities. When the stage for the proving of its debt did arise, the petitioner would necessarily have to prove for the balance of the debt which was due and owing to it after the security in respect of which the petitioner was a secured creditor was realized. The Court, therefore, took the view that the petition for winding up filed by the secured creditor was maintainable.

22.Reliance is also placed on the decision of this Court in the case of *Industrial Finance Corporation of India V/s. Official Liquidator, Amruta Mills Ltd., 102 Company Cases 253* for the proposition that mere constitution of Sale

Committee or the participation of secured creditors as a member of Sale Committee would not amount to relinquishment of security by the secured creditors. The Court has held that it is true there is no specific provision either in the Code of Civil Procedure or in the IFCI Act or in the IRBI Act or the Companies Act specifically providing for appointing/creating a sale committee for the sale of the property of the Company in liquidation. But at the same time, in the Companies (Court) Rules, 1959, pertaining to the sale by the Official Liquidator, there are Rules 272, 273 and 274. If the provision of Rule 273 is considered, then it will be clear that ordinarily, the sale of the property in a liquidation proceeding is to be held by the Official Liquidator; but it also empowers the company judge to issue directions to have a sale agent or sale committee. A sale committee is a creation of the courts. The sale committee is appointed by

the court with a view to see that the interests of the secured creditors as well as the labourers and unsecured creditors are fully protected and achieved. The sale committee is appointed in order to see that the maximum possible price for the property to be sold is received. There is another purpose in appointing the sale committee and that is to avoid allegations against the Official Liquidator or single agent, who is directed to sell the property and to avoid investigation of the allegations against such persons. Generally, representatives of the secured creditors are taken on the sale committee with a view to see that the property which is hypothecated or mortgaged fetches proper and good value so that their dues are fully recovered. The appointment of a sale committee is always in the interest of all persons who are interested in securing their dues and it is also in the interest of the company which has

gone into liquidation. There could not be any legal objections to such appointment because it could not be said that by appointing a sale committee any prejudice is caused to any of the secured creditors or anybody else. In fact, the control for the sale is of the court and unless the court accepts the final bid and confirms the sale effected by the sale committee, the sale will not be effective. It is also the discretion of the court as to who should be the members of the sale committee.

23.Reliance is also placed on the decision of this Court in the case of *Gujarat State Financial Corporation V/s. Official Liquidator and others, 87 Company Cases 658* wherein the Court has taken the view that the right of secured creditors to realize the security outside winding up is not affected by amendments to Section 529 and 529-A of the Act. The secured creditor of a company in

liquidation is ordinarily outside the winding up proceedings in the matter of realizing his security, where intervention of the Court is not sought as a result of the provisions of Section 529 (1) of the Companies Act, 1956, read with Section 28 (6) of the Provincial Insolvency Act, 1920 which is on the principle that the secured creditor in realizing his security without intervention of the court is not enforcing any claim against property of the insolvent but is going to enforce the claim to his own property. This conclusion is further fortified by the proviso to Section 529 (2) of the Companies Act, 1956, inserted in 1960 which required that all debts may come under the winding up and claims in respect of such debts may be made against the company. The proviso clarified that where a secured creditor "instead of relinquishing his security and proving for his debt opts to realize the security", he shall be liable to pay the

expenses incurred by the liquidator for the preservation of the security before its realization by the secured creditor. The proviso emphasizes the position that the secured creditor is still entitled to keep himself outside the winding up proceedings and realize the security without the necessity of proving his debts. By the amendment to the proviso to Section 529 (2) of the Companies Act, 1956, and insertion of the explanation thereto in 1985, the only change which has been made is that the secured creditor too is liable to pay only the proportionate expenses for preservation taking into consideration the *pari passu* charge in favour of the workmen's dues. But the fact remains that it has yet been left at the option of the secured creditor to realize the security without proving his debt in the winding up proceedings. The Court further held that Clauses (a), (b) and (c) of the proviso to Section 529 (1) come into

operation only when a secured creditor instead of relinquishing his security and proving his debt opts to realize the security. It is on exercise of this option by the secured creditor that the liquidator becomes entitled to represent the workmen and enforce the charge under clause (a) of the proviso to Section 529 (1); that the liquidator becomes responsible for rateable distribution of amounts realized by enforcement of such charge and it is only if as a result of enforcement of such charge on realization of the security, any part of the debt due to such secured creditor could not be realized by him, that to that extent, he ranks *pari passu* with the workmen's dues under Section 529A as per the provisions of sub-clause (c) of the proviso to sub-section (1) of Section 529. In case the secured creditor does not opt to realize the security, the liquidator by dint of the proviso to Section 529 (1) does not become a charge holder in the estate of the

company so as to exercise the right of a simple mortgagee. The newly inserted provision creating a charge in favour of the workmen and authorizing the liquidator to enforce such charge on behalf of the workmen, does not empower the liquidator or the workmen to enforce such charge independent of the option of the secured creditor to realize the security. The Court further held that the secured creditor, if he decides to realize his security without intervention of the court, is outside the winding up proceedings. Section 529A in respect of the secured creditor comes into play only in respect of the debt which has not been realized by the secured creditor and not otherwise. Where a secured creditor opts to realize his security without relinquishing his security and without proving his debt, the realization is to be governed by the proviso to Section 529 (1) and the workmen get from such realization only that much

proportion for which they rank *pari passu* qua the realization of the security. It is only for the remainder, for the purpose of disbursement of dividend by the Official Liquidator from the realization from the assets of the company which could not have been realized by the secured creditor or in respect of which the secured creditors have relinquished their security, that the workmen's dues are to be paid in priority. Even then along with the workmen's dues, the debts due to the secured creditor to the extent they could not be realized from the security due to enforcement of the *pari passu* charge of the workmen's dues have also been given the same priority as workmen's dues. Section 529A has no application to priorities in respect of realization of securities which have not been relinquished by the secured creditors. Such realization is governed by Section 529 alone. Thus, the conclusion is irresistible from a

reading of the provisions of Sections 529 & 529A of the Companies Act read with Section 28 (6) of the Insolvency Act, that the principle enunciated in Ranganathan's case [1955] 25 Company Cases 344 (SC) still applies to the secured creditor who instead of relinquishing his security and proving his debts opts to realize the security without intervention of the Court.

24.It is true that the above decision of the Gujarat High Court has come up for consideration before the Hon'ble Supreme Court in the case of *International Coach Builders Limited V/s. Karnataka State Financial Corporation, (2003) 10 S.C.C. 482* and the Hon'ble Supreme Court has observed that the reasoning of the Gujarat High Court that in case the secured creditor does not opt to realize the security, the liquidator, by dint of the proviso to Section 529, does not become

a charge-holder in the estate of the company so as to exercise the right of a simple mortgagee as envisaged under Section 100 of the Transfer of Property Act, appears to be non sequitur. If a secured creditor does not opt to stand outside the winding-up but relinquishes his security and proves his debt in the winding-up, then there is no doubt that the Official Liquidator will come into custody of all the assets of the Company in liquidation and the distribution of the assets would have to proceed in accordance with the provisions of Section 529-A of the Companies Act, in which case the secured creditor stands in line as an unsecured creditor. It is only when State Financial Corporation as a secured creditor opts to stand outside the winding-up and seeks to realize its security that the conflict, if any, can arise. The fact that the liquidator or the workmen do not have a right independently to enforce the charge, unless the

creditor decides to stand outside the winding-up, does not make any difference to the situation. It is not the contention of the State Financial Corporation that they do not desire to exercise the option available to them of standing outside the winding-up. In fact, it is their contention that as mortgagees they have a right to stand outside the winding-up and are not subject to the supervisory jurisdiction of the Company Court. They also contend that, unlike other mortgagees, they have a special right by reason of Section 29 of the State Financial Corporation Act of taking possession of the assets and realizing them by sale, transfer and so on. The Court, therefore, expressed its inability to accept the reasoning of the Gujarat High Court as correct. The Court further held that as a result of the amendments made by the Act of 1985 in the Companies Act 1956, State Financial Corporations as secured creditors, must seek

leave of the Company Court for the limited purpose of ensuring that the *pari passu* charge in favour of the workmen is safeguarded by imposition of suitable conditions under the supervision of the Company Court. If this amounts to impleading their hitherto unimpeded rights, so be it. Such is the parliamentary intendment. This impediment is of a limited nature for the specific purpose of protecting the *pari passu* charge of the workmen's dues and subject thereto, State Financial Corporations can continue to exercise their statutory rights as secured creditors without being reduced to the status of unsecured creditors required to prove their debts in insolvency and stand in line with other unsecured creditors. It is, therefore, contended that this judgment of the Hon'ble Supreme Court would not adversely affect the rights of the secured creditors. On the contrary, it supports the case of the secured creditors to the extent that while

exercising their option to remain outside the winding up proceedings and without relinquishing their securities, they still remain as secured creditors and they are not required to prove their debts before the Official Liquidator.

25.Reliance is also placed on the decision of the Karnataka High Court in the case of *State Bank of Mysore V/s. Official Liquidator and Others, 58 Company Cases 609* wherein it is held that the provisions of Section 47 of the Provincial Insolvency Act, 1920, are intended for the benefit of the mortgagee and not to his detriment. He can follow any one of the three procedures suggested in the section. A mortgagee cannot relinquish his rights except by an instrument provided for the relinquishment of rights under law. There cannot be an implied surrender in terms of sub-S. (3) of Section 47 and the surrender referred

to therein should be construed as a surrender in accordance with law. The Court further held that the facts showed that the bank had first stood outside the winding up and the sale was requested by the Official Liquidator. It was in that circumstances that the Court gave notice to the Bank and the Bank stated that the property might be sold subject to the security being transferred to the sale price received. Hence, Section 47 (3) of the Provincial Insolvency Act, 1920, would not apply and the Bank was entitled to realize the amount due to it as a secured creditor.

26.Reliance is also placed on the decision of the Karnataka High Court in the case of *Karnataka State Financial Corporation V/s. Patil Dyes and Chemicals (P.) Ltd. and Others, 70 Company Cases 38* wherein the Court has held that the first proviso to Section 529(1) is clear, i.e., the Official Liquidator must represent the

workmen and enforce the charge in their favour. The Official Liquidator must take the necessary steps to file the claim of the workmen before the court before the rights of the secured creditors are determined and the priorities under Section 529A are worked out. The value of the security of the secured creditor shall be after ascertaining the value of the workmen's portion under the illustration to Section 529. For this purpose, the Official Liquidator must take necessary steps to issue notices to the workmen, and after ascertaining their dues, must make the necessary application before the Court under Section 446 (2) for working out the preferential payments under Section 529A. This procedure would satisfy the claim of the secured creditors as also the claim of the workmen and the company court will be in a position to determine the order of priorities and also the claims of the secured creditors and the workmen in a common

adjudication under Section 446 (2) (b) of the Act.

27.Reliance is also placed on the decision of the Madras High Court in the case of *Indian Bank V/s. V.S. Perumal Raja and Others, 76 Company Cases 787* wherein the Court held that Section 529A of the Act enables the secured creditor who has suffered in paying the workmen's dues from out of the realization of his security, to recover what he has so suffered from the other assets in the hands of the Official Liquidator preferentially. That is, the said amount suffered by him shall be paid in priority to all other debts. But, this does not mean that he cannot recover at all any other unrealized portion of the debt due to him. There is no prohibition of a secured creditor in the liquidation, to prove for the balance due to him, along with the other creditors before the Official Liquidator. In the case before the

Madras High Court, in an application to the High Court under Section 446 of the Companies Act, 1956, filed by a secured creditor for leave to continue the suit filed by it against a Company in liquidation, the Court granted leave subject to the following conditions : (a)That the applicant shall, in the event of obtaining a decree in its favour, enforce the same only against the assets that are proved by the applicant to be held in security by it and not against other assets. (b) Since the applicant had chosen to ignore the liquidation and was relying on the security, if there was a deficiency by sale of the securities, the applicant would be excluded from all share in any dividend that may be declared by the Official Liquidator in the liquidation except and to the extent provided for under Section 529A of the Companies Act. (c) In the event of the applicant being declared a secured creditor in the above suit, the applicant could realize

the security and appropriate the same subject to the right of workmen under Sections 529 & 529A of the Companies Act, 1956. The Creditor has challenged these conditions by filing an appeal before the Division Bench and the Division Bench has held (i) that so far as condition (a) was concerned, no objection could be raised thereto, since after the winding up order was passed, the Creditor could not by itself initiate any action against the assets which are held by the Official Liquidator as the custodian of the Company Court. (ii) That there being no prohibition on a secured creditor's realization of its security and for the balance due to it, condition (b) which stated that the creditor would be “excluded from all share in any dividend except to the extent provided for under Section 529A of the Companies Act” was not justified. (iii) That condition (c) was in keeping with the statutory provisions and could not be objected to. The

Court further held that the conditions stipulated by the court while granting leave only purported to incorporate the provisions of law contained in the Act even when those conditions were not specified the company law would automatically apply. Moreover, after leave was granted, the Official Liquidator would have adequate opportunity to make proper representations before the court. Therefore, strictly, there was no necessity to impose the said conditions.

28. Considering the aforesaid legal authorities on the subject, it was strongly contended by the learned advocates appearing for the secured creditors that the contention raised by Dr. Sinha on behalf of the workmen does not appear to be a sound one and workers cannot claim their exclusive right of satisfaction of their claim out of the sale proceeds of the assets of the Company in liquidation. The judgment

delivered by the Hon'ble Supreme Court in the case of *Andhra Bank V/s. Official Liquidator and another, 2005 AIR SCW 1608* as well as *Allahabad Bank V/s. Canara Bank and another (2000) 4 SCC 406* do not lay down the proposition that even if the secured creditor remains outside the winding up and does not relinquish his security, he cannot claim anything from the sale proceeds of the assets of the Company in liquidation unless and until the workers dues are fully satisfied. The Court has made it very clear that whatever secured creditor losses towards workmen's portion out of the security, he can claim the same amount with priority over such unsecured creditors out of realization made by other creditors whose monies are lying in the Tribunal. The Court has also not approved the stray observation made to the effect that the workmen's dues have a priority over all other creditors, secured and unsecured because of

Section 529-A (1) (b). The Court, therefore, held that such finding given in the case of *Allahabad Bank V/s. Canara Bank and another (Supra)* to the said extent does not lay down the correct law.

29.Considering the above referred legal position, the Court is of the view that the claim made by the Unions in these applications with regard to their exclusive right of satisfaction of their claim out of the sale proceeds of the assets of the Company in liquidation in priority of all other creditor secured as well as unsecured is not tenable. The Court is also of the view that simply because the secured creditors participate in the sale proceedings undertaken by the Court and they also became the members of the Sale Committee constituted pursuant to the directions issued by the Court does not mean that they have exercised their option of remaining outside the winding up and they have

relinquished their security. As a matter of fact, relinquishment of security by the secured creditors require a positive action on the part of the secured creditors. They have never stated in any of the proceedings that they are relinquishing their securities. On the contrary, they have made it clear that they remain outside the winding up and they participate in the sale proceeds only with a view to facilitate the sale proceeds so as to get the auction proceedings completed as expeditiously as possible. There is also substance in the say of the secured creditors that as soon as the assets of the companies are sold and realization is taken place, their securities are converted from the specified assets into cash and they have equal right in cash which is realized on sale of the assets of the Company in liquidation. In the above view of the matter, the ratio between the secured creditors and the workmen will have to be

determined and the distribution will take place as per the ratio so decided or determined.

30.Earlier, the Court has passed an order for distribution of the sale proceeds in the ratio of 40% to 60% on ad hoc basis. Thereafter, number of objections have been raised. Only 4 crores have been distributed. The remaining amount is still lying with the Official Liquidator. Before any order of disbursement is passed, the ratio is correctly required to be worked out. In this connection, serious objections are raised on behalf of the secured creditors. It is stated in the affidavit filed on behalf of Bank of Baroda that the claim of the applicant – union is excessive and inflated and includes the items which are inadmissible in law and in view of the guidelines laid down by this Court in the case of Textile Labour Association V/s. Official Liquidator of Jubilee Mills Ltd. (in liquidation). It is further

stated that the Chartered Accountant, while rightly disallowing certain items like bonus, notice pay and HRA, left certain aspects to be determined by the Official Liquidator who has yet to offer his comments thereon. The Chartered Accountant has computed the claim of the workmen upto the date of winding up and not upto the date of the closure of the company which is not correct in the facts of the present case. The claims of the workmen drawing basic pay above Rs. 2,000/- have also been considered while verifying the claim. It is also necessary to remove the claims of the casual workers while computing the claim of the workmen. Without ascertaining the date of birth of the workmen, the claims of workmen have been verified as if it is not possible to know the age of super-annuation without knowing the date of birth. In absence of the affidavit of each workmen disclosing their date of birth and other lacuna, the report of the Chartered

Accountant pertaining to the assessment of the workmen's claim cannot be accepted and directions are required to be issued to the Official Liquidator to get the claim of the workmen re-verified taking into account all these aspects.

31. It is further stated that in view of the prevailing legal position, the relief prayed for in the Judge's Summons cannot be granted. On the contrary, directions are required to be given to the Official Liquidator to get the claim re-verified by the Chartered Accountant in light of the submissions made. The members of the applicant – unions do not have any first right over the amount realized by way of sale of property of the Company in liquidation and that the rights of the other creditors can be settled only after the claims of workmen are settled as per the provisions of Companies Act, 1956. The interpretation sought to be put

forth by the applicants – unions regarding the provisions of law and the authority is absolutely baseless, ill-founded, misconceived and misplaced and deserves to be rejected forthwith. The applicants have miserably failed to appreciate the relevant provisions of law and the judgment in proper perspective.

32. Considering the above facts and submissions and the legal position, the Court hereby disposes of Company Application Nos. 375 of 2004 and 362 of 2004 as the said two applicants have subsequently filed two other applications being Company Application Nos. 232 & 233 of 2005 wherein the claims of the respective unions have been enhanced. No useful purpose would be served to keep these two applications pending as the claim made therein is also reflected in the subsequent two applications. So far as Company Application Nos. 232 & 233 of 2005 are concerned, the Official Liquidator is

hereby directed to get the claim of the workers re-verified in view of the observations made herein above and after submission of the re-verification report of the Chartered Accountant, the ratio would be worked out and further order with regard to disbursement will be passed.

33.Since the Court has decided the main issue in the aforesaid terms, the other applications which are tagged along with these applications are also to be placed before the appropriate Court for passing necessary orders.

34.In the above view of the matter, Company Application Nos. 362 & 375 of 2004 are disposed of and the remaining applications are ordered to be placed before the appropriate Court.

35.Office is directed to place copy of this judgment in each matters of companies in

liquidation, namely, Gujarat Steel Tubes, Nika Tubes, New Gujarat Synthetics Ltd. and Omex Investors Ltd.

[K.A. PUJ, J.]

S*avariya*